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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BOBBY JOSEPH HARRIS, Appellant.	2 CA-CR 2007-0329 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064422

Honorable Michael J. Cruikshank, Judge

AFFIRMED IN PART, REVERSED IN PART

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E S P I N O S A, Judge.

¶1 After a jury trial, Bobby Harris was convicted of one count each of second-degree murder, attempted first-degree murder, aggravated assault with a deadly weapon or dangerous instrument, aggravated assault with serious physical injury, and two counts of endangerment. He was sentenced to a total of twenty-five years' imprisonment, including one consecutive year for each of the two endangerment counts. On appeal, Harris contends the trial court erred by admitting a telephone message into evidence at trial and denying his motion for judgment of acquittal as to three of the charges. For the reasons stated below, we reverse Harris's conviction on one count of endangerment and affirm the remaining convictions.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Garza*, 216 Ariz. 56, n.1, 163 P.3d 1006, 1011 n.1 (2007). In early November 2006, Harris and his girlfriend, Regina R., moved into an apartment in a Tucson duplex. V., his wife S., and their two-year-old child V. Jr. lived in the adjoining apartment. The two apartments' front doors faced each other and were approximately ten feet apart. S. and Regina had been best friends for years. R., V.'s nephew, had been living with V. and S. for several weeks.

¶3 On the night of November 18, 2006, Harris returned to his apartment to find Regina and R. "messing around" on the living room sofa. After yelling at R., Harris left and closed the door behind him. R. immediately got up from the sofa and left Harris's apartment. When R. passed Harris while crossing the short path to reach his uncle's apartment, R. said,

"[d]on't trip on me, . . . trip on your bitch." Moments later, as R. was entering his uncle's front door, Harris shot R. in the leg. Harris followed R. to the doorway of the apartment and shot at R. several more times and at V., who was in the living room with V. Jr., striking R. five times and V. three to four times. V. died from his wounds and R. was seriously injured.

¶4 S., who had been asleep in her bedroom, testified she was awakened by a "loud pop," glass shattering, and R. screaming out her name. S. jumped out of bed, opened her bedroom door, and found R. lying on the floor. She screamed for V. and saw him lying face down in front of the couch. V. Jr. was "standing right over [V.] screaming." There was still smoke and a sulfur smell in the living room area from the gunfire. Harris fled the scene by car.

¶5 Later that night, Harris left a message for Regina on her cellular telephone. In the message, Harris called Regina a "ho,"[1] said he "kn[e]w what [she] was . . . doing," and said various forms of the word "motherf----r" numerous times.

¶6 The trial court denied Harris's pretrial motion to preclude the state from introducing the telephone message at trial. The court rejected Harris's argument that the repeated profanity made it "horribly prejudicial." Later, during voir dire, Harris's counsel told the prospective jurors the case included "some pretty heavy profanity" and "a lot of the F word" and asked whether any of them would be so offended that it would detract their

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[1]"Ho" is a slang term for the word "whore." *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/ho%5B2%5D (Nov. 17, 2008); *see also United States v. Murphy*, 406 F.3d 857, 859 n.1 (7th Cir. 2005) (describing word "ho" as "staple of rap music vernacular").

attention from the case or whether they would feel uncomfortable sitting as a juror because of the profanity. None of the jurors responded in the affirmative. At trial, a number of witnesses testified that Harris's use of the word "motherf----r" as a transitional word in his speech was the result of a stroke he had suffered several years earlier, which had also left the right side of his body impaired.

Admission of Harris's Telephone Message

¶7 Harris contends the trial court erred in denying his motion to preclude the telephone message to Regina. Relying on Rule 403, Ariz. R. Evid., he argues the message was "far more prejudicial than probative" because allowing the jury to hear him use "this expletive over and over would prejudice [the jury] against [him]."

¶8 Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "'Evidence is unfairly prejudicial only when it has an undue tendency to suggest a decision on an improper basis such as emotion, sympathy, or horror.'" *State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007), *quoting State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995). The balancing of factors under Rule 403 is "peculiarly a function of trial courts, not appellate courts," and we review the court's ruling on the admission of evidence for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 26, 10 P.3d 1181, 1190 (App. 2000). Moreover, we must view the evidence "in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994). Significantly, it "would require a

rare case for the defendant's own statement to be seen as prejudicial to the extent that it should be excluded under Rule 403." *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶9 The trial court did not abuse its discretion in admitting the telephone message. At the outset, the message was probative of Harris's knowledge that Regina had been unfaithful. This knowledge refuted Harris's defense that he was not the person who had walked in on Regina and R. It was also probative of Harris's motive and intent to shoot R.

¶10 Moreover, several factors mitigated against the possibility that the effect of the profanity would be unfairly prejudicial. First, the prospective jurors were warned about the profanity-intensive nature of the case and none of them indicated that such language would affect their ability to serve as impartial jurors. In addition, a number of witnesses, including two police officers and two individuals who had known Harris for years, testified Harris's use of such language was the result of a past stroke. These facts severely undercut Harris's assertion that "the jury would react negatively, and be prejudiced by the constant use of 'motherf----r' by Mr. Harris." *See Cañez*, 202 Ariz. 133, ¶¶ 60-61, 42 P.3d at 584 (finding no abuse of discretion in admitting defendant's audiotaped statement which "showcase[d]" defendant's "thick accent, poor grammar, limited education, and cocky, nonchalant attitude"); *State v. Fulminante*, 193 Ariz. 485, ¶ 60, 975 P.2d 75, 92-93 (1999) (rejecting Rule 403 challenge to admission of defendant's prior statement to murder victim "I'll kill your f[-----g] ass"); *see also United States v. Pirani*, 406 F.3d 543, 555 (8th Cir. 2005) (rejecting challenge under Rule 403 of the Federal Rules of Evidence to admission of recording in which

defendant was "swearing expressively" and finding "the profanities did not create a risk of *unfair* prejudice that substantially outweighed the tape's probative value"). Accordingly, we cannot say the trial court abused its discretion in determining that the probative value of the message was not substantially outweighed by the danger of unfair prejudice.

Denial of Rule 20 Motion

¶11 Harris next argues the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., as to the two charges of endangerment and the charge of aggravated assault with a deadly weapon or dangerous instrument. We review the court's ruling on a motion for judgment of acquittal for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *Id.* "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *Id.* "In determining the sufficiency of the evidence to withstand a Rule 20 motion, we view the evidence in a light most favorable to sustaining the verdict." *Id.*

Endangerment Charges

¶12 Harris was convicted of two counts of endangerment; S. was the victim in one count and V. Jr. was the victim of the other. Thus, the state was required to prove that Harris had "recklessly endanger[ed]" both S. and V. Jr. "with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201(A). One element of endangerment is "that the victim must be placed in *actual* substantial risk of imminent death or physical injury." *State v. Doss*,

192 Ariz. 408, ¶ 7, 966 P.2d 1012, 1015 (App. 1998). Harris argues the trial court should have granted his Rule 20 motion as to both counts of endangerment because "the evidence showed that [S.] was asleep in her bedroom with the door closed during the shooting" and "there was conflicting evidence as to where [V. Jr.] was at the time of the shooting."

¶13 Although there was contradictory testimony as to V. Jr.'s whereabouts during the shootings, it was for the jury to resolve such conflicts. *See State v. Cox*, 214 Ariz. 518, ¶ 13, 155 P.3d 357, 360 (App. 2007), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). Moreover, even entirely circumstantial evidence can provide a sufficient basis to warrant a conviction. *See State v. Anaya*, 165 Ariz. 535, 543, 799 P.2d 876, 884 (App. 1990) ("Evidence wholly circumstantial can support differing, yet reasonable inferences sufficient to defeat a motion for a directed verdict.").

¶14 At trial, S. testified that two-year-old V. Jr. had been with V. when S. had gone to bed and that when she ran into the living room seconds after the shootings, V. Jr. was standing next to his father. The state also presented evidence that several bullets had ricocheted around the living room during the shootings. Thus, there was substantial evidence from which reasonable jurors could find Harris had endangered V. Jr., and the trial court did not abuse its discretion by denying the Rule 20 motion as to this charge. *See Anaya*, 165 Ariz. at 543, 799 P.2d at 884.

¶15 As to the endangerment count related to S., however, there was far less evidence. The state presented testimony that Harris was "[r]ight there in the [front] doorway" and his gun was inside the doorway when he fired multiple shots inside the apartment.

S. testified she was sleeping in her bedroom with the door closed when the shootings occurred. S. also testified that in order to reach her bedroom, one must walk past the bathroom.

¶16 No evidence was presented establishing whether any of the shots had been fired in the direction of S.'s bedroom.[2] Nor was there evidence that any of the shots, all of which were fired from the front doorway, could have reached S. in her bedroom, either through the closed bedroom door or through a wall. *Cf. State v. Carreon*, 210 Ariz. 54, ¶¶ 38, 42-43, 107 P.3d 900, 909-10 (2005) (affirming denial of motion for directed verdict on endangerment charges where children were asleep in their bedroom when victims were shot in adjacent room, only a thin wall separated the two rooms, police recovered a bullet from doorjamb of children's bedroom, and bedroom door was in close proximity to where one of victims collapsed).

¶17 Unlike in *Carreon*, the doorway from which the shots were fired was on the opposite end of the apartment from S.'s bedroom and no evidence was presented establishing any shots had ricocheted in the direction of the bedroom. Moreover, photographs and a diagram presented at trial showed a utility closet through which a bullet would have had to travel to reach the bed in S.'s room. There was no evidence about the thickness of the walls, whether the gun and ammunition used would have been able to penetrate multiple walls, or any other evidence from which reasonable jurors could find Harris had endangered S. by

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[2]The state apparently recognizes this evidentiary problem because its entire analysis of this issue is limited to its statement that S. "could easily have been struck by bullets" by sleeping "in the bedroom within close proximity of the living room."

subjecting her to an actual risk of imminent death or injury. *See Doss*, 192 Ariz. 408, ¶ 13, 966 P.2d at 1016 (reversing endangerment conviction and remanding for retrial; state's theory that victims in house endangered by "possibility of ricochets" from defendants' firing shots into victims' house insufficient by itself to establish actual danger). The state easily could have introduced such evidence; in its absence, we are confined to the record before us. *Cf. State v. Claybrook*, 193 Ariz. 588, ¶¶ 13-17, 975 P.2d 1101, 1103 (App. 1998) (reversing conviction where state failed to present evidence necessary for elements of offense; appellate court refused to speculate as to evidence not contained in record). Accordingly, we reverse Harris's conviction on this count of endangerment.[3]

Aggravated Assault Charge

¶18 Finally, Harris summarily contends the trial court should have granted his Rule 20 motion on the charge of aggravated assault with a deadly weapon or dangerous instrument, arguing this offense is a lesser-included offense of attempted first-degree murder. Because Harris has failed to properly develop and support this argument, we need not address this claim. *See* Ariz. R. Crim. P. 31.13(c)(vi) (appellant's brief must contain argument with citations to authority); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 (2004) ("'[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised'" and "'[f]ailure to argue a claim usually

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[3]Although Harris's Rule 20 motion on the endangerment charges was denied based on a theory of transferred intent, we find this theory inapplicable to these facts. *See* A.R.S. § 13-203(C); *State v. Johnson*, 205 Ariz. 413, ¶¶ 14-25, 72 P.3d 343, 348-50 (App. 2003) (interpreting transferred intent statute).

constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).[4] In any event, the argument lacks merit because aggravated assault is not a lesser-included offense of attempted murder. *State v. Fernandez*, 216 Ariz. 545, ¶ 31, 169 P.3d 641, 650 (App. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 460 (2008).

Disposition

¶19 For the reasons set forth above, we reverse Harris's conviction for endangerment of S. Harris's remaining convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge

[4]We note that counsel's entire opening brief fails to effectively set forth the applicable facts or develop and support Harris's legal arguments.